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Supreme Court of the United States

October Term—1948

No. 156
No. 49 Miscellaneous

Margaret C. Donovan,

Petitioner,

against

Queensboro Corporation, Garden Housing Corporation, The Terminal Heights Corporation, Queensboro Investing Company, A. Edward MacDougall, Henry S. Lockwood, A. Edward MacDougall, as Executor of the Last Will and Testament of Edward A. MacDougall, Deceased,

Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI AND IN OPPOSITION TO MOTION FOR LEAVE TO FILE SUCH PETITION

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The plaintiff has not availed herself of the provisions which she herself caused to be inserted therein, whereby there was reserved to her the right to "obtain the modification or vacation" of the order through the presentation of further matter of fact or of law or of argument; and she has not availed herself of the invitation of the District Court to present objection to the amount of the security fixed by it 6

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BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI AND IN OPPOSITION TO MOTION FOR LEAVE TO FILE SUCH PETITION

Statement of Facts

This action by the petitioner as plaintiff was brought in the United States District Court for the Eastern District of New York, allegedly in a derivative right as the holder of a voting trust certificate for 111½ shares (2.35%) of the outstanding capital stock of the defendant, Garden Housing Corporation. She demanded a receiver and an accounting (R. p. 2).

On October 10, 1947, the defendant moved to dismiss the amended complaint and, in the alternative, that the plaintiff be required, under Sections 61(b) and 64 of the General Corporation Law of the State of New York, to give to the defendant, Garden Housing Corporation, security in the amount of $50,000 for the reasonable expenses, including attorneys' fees, which might be incurred by that corporation and by the other parties-defendant in connection with the action, and that, pending the deposit of such security, further proceedings on the plaintiff's part be stayed (R. p. 2).

On November 17, 1947, the Court (Judge Inch) delivered an opinion denying the motion to dismiss but granting the alternative prayer for security in the sum of $50,000 (R. p. 4).

On November 24, 1947, the Court entered on this decision an order, the directing portions of which read as follows (R. pp. 9-11):

> "Ordered, that the motions by the defendants to dismiss the complaint be and the same hereby are denied; and it is further
>
> Ordered, that the motion by the defendants for security be and the same hereby is granted, and the plaintiff be and she hereby is required, pursuant to the provisions of Sections 61(b) and 64 of the General Corporation Law of the State of New York, to give to the defendant Garden Housing Corporation security satisfactory to this Court in the amount of $50,000 for the reasonable expenses, including attorneys' fees, which may be incurred by said Garden Housing Corporation and by the other parties defendant in connection with this action, for which said Garden Housing Corporation may become subject; and it is further
>
> Ordered, that pending the deposit of the security as aforesaid all further proceedings on the part of the

plaintiff except to comply with the terms of this order and *except to review this order or to obtain the modification or vacation thereof* be and the same hereby are stayed; and it is further

Ordered, that the time for the defendants to move to or answer the amended complaint herein be and the same hereby is extended 20 days after the deposit of the aforesaid security by the plaintiff with notice to the defendants." (The italics are ours.)

The words italicized were inserted at the request of plaintiff's counsel on the settlement of the order, because, as said by Judge Inch, "I felt she could object to the amount of security fixed by me" (R. pp. 3, 16).

On November 28, 1947, the plaintiff's attorneys moved to add to this order a provision that, in the event the required security were not given within ten days, the amended complaint be dismissed (R. p. 3).

This motion was denied by the Court with the following memorandum (R. p. 3):

"Dec. 12, 1947
This motion is denied.
I signed the form of order submitted by plaintiff as I felt she could object to the amount of security fixed by me. That was all before the Court as I had denied the motion to dismiss the complaint on the grounds urged by the defendant and ordered security to be furnished. Anything else, such as a new motion to dismiss must await a motion by defendant if and when made.

Robert A. Inch."

The order of denial was dated December 19, 1947 (R. pp. 3, 11).

On December 24, 1947, the plaintiff served a notice of appeal to the Circuit Court of Appeals for the Second Circuit from the aforesaid order of November 24, 1947, and from the aforesaid order of December 19, 1947 (R. p. 13).

The defendants thereupon moved in the Circuit Court of Appeals to dismiss the appeal "because the orders sought to be reviewed are not final decisions and are not appealable" (R. pp. 1-4). In March 23, 1948, this motion was unanimously granted, without opinion (R. p. 23).

Subsequently, the plaintiff petitioned the Circuit Court of Appeals for a rehearing or, in the alternative, for a certification of alleged questions to this Court (R. pp. 24, 29). This petition was denied, without opinion, by order entered April 16, 1948 (R. p. 35).

The plaintiff now petitions for a writ of certiorari to the Circuit Court of Appeals or, in the alternative, for a writ under Section 262 of the Judicial Code.

POINT I

The petition and motion are without foundation or merit. Basically, they seek a review of the District Court's order of November 24, 1947; but the record on which such order was made is not presented here.

The only record presented to this Court is the record of the following proceedings in the Circuit Court of Appeals:

1. Notice of motion and affidavit to dismiss the appeal;
2. Affidavit in opposition;
3. Order dismissing the appeal;
4. Petition for rehearing and certification of questions;
5. Order denying such petition.

The District Court's order of November 24, 1947, is in the record solely as Exhibit "B" attached to the defendants' motion for dismissal in the Circuit Court of Appeals. That order recites, as the record on which it was based, the amended complaint, the notices of motion to dismiss the amended complaint, the affidavit of Charles H. Tuttle in support of such motion, various exhibits attached thereto, and the affidavits of Edward F. Clark and Margaret C. Donovan in opposition.

None of these papers is in the record now presented to this Court.

On this record, the only subject admissible for any possibility of consideration is the decision of the Circuit Court of Appeals dismissing the appeal.

The refusal of the Circuit Court of Appeals to grant a rehearing or certify questions was purely discretionary and presents nothing for consideration by this Court.

POINT II

Furthermore, the plaintiff presents no case within the settled rules for the issuance of a writ of certiorari.

The order of November 24, 1947, was not final, and, at the plaintiff's own request, was made merely tentative.

The plaintiff has not availed herself of the provisions which she herself caused to be inserted therein, whereby there was reserved to her the right to "obtain the modification or vacation" of the order through the presentation of further matter of fact or of law or of argument; and she has not availed herself of the invitation of the District Court to present objection to the amount of the security fixed by it.

(1) As set forth above in the Statement of Facts, the District Court, in settling its order of November 24, 1947, accepted the counter-form proposed by the plaintiff's counsel who successfully urged that there should be included in the directive portion the following words which we italicize (R. pp. 3, 16):

> "ORDERED, that pending the deposit of the security as aforesaid all further proceedings on the part of the plaintiff except to comply with the terms of this order and *except to review this order or to obtain the modification or vacation thereof* be and the same hereby are stayed."

The plaintiff has never availed herself of this saving clause sought and obtained by her for her own relief and benefit. In asking for it, she impliedly represented her intention to use it. The fact, however, is that she has never presented to the District Court an application for

a reconsideration or new matter of fact or of law or of argument for the modification or vacation of the security thus ordered only tentatively.

She did, on November 28, 1947, move the District Court for the addition of a further provision that, in the event that the security be not furnished within ten days, the amended complaint be automatically dismissed. This motion was denied (R. p. 3). The granting of it would have enabled the plaintiff to achieve automatically the very dismissal which she herself had opposed and the Court had refused by the simple stratagem of not complying within ten days with the requirement for security. In denying this motion, the District Court said (R. p. 3):

> "I signed the form of order submitted by plaintiff as I felt she could object to the amount of security fixed by me."

(2) In the second place, notwithstanding this express invitation by the District Court, the plaintiff once again deliberately omitted to avail herself of the opportunity for relief thus held open to her a second time by the District Court,—and this notwithstanding that in their affidavit in opposition to the motion to dismiss their ensuing appeal, the plaintiff's counsel acknowledged that they recognized that this invitation by the District Court was "an intimation" of a "possible reconsideration of the amount of security" (R. pp. 17, 18).

(3) For these several reasons, the order of November 24, 1947, was in no sense final even as a temporary determination. It was merely tentative, and was twice expressly held open by the District Court for reconsideration by it on motion of the plaintiff.

In consequence, the Circuit Court of Appeals had, in no event, jurisdiction to entertain an appeal therefrom while these remedies and opportunities were still available to the plaintiff in the District Court.

Like considerations are now applicable in this Court.

(4) Parenthetically, it is noteworthy that the plaintiff's attorneys are, admittedly, themselves the real parties in interest,—"the beneficial owners" of the trust certificate (R. pp. 16, 17, 22).

The plaintiff states that she is not able to furnish the security (R. p. 17); but there is no such statement by her attorneys,—the real parties in interest (R. p. 22). They merely say that they are unwilling to "wager" such a sum "on the outcome of the suit" (R. p. 22). But they are perfectly willing to force the defendant corporation (Garden Housing Corporation) to "wager" such a sum through the operation of Sections 61(b) and 64 of the General Corporation Law of the State of New York; although they are unwilling to give it any security as against such enforced "wager".

POINT III

Furthermore, and irrespective of the foregoing, the order of November 24, 1947, was a mere stay in the course and conduct of the action which consists of a single cause of action in equity.

It affected that action only, and was conditioned exclusively on an act to be performed within that action. It related to no suit, proceeding, act or event outside of the action itself. It concerned merely security for costs.

(1) The appellate jurisdiction of the Circuit Court of Appeals is limited to "final decisions" and to injunctions and receiverships. (Sections 128 and 129 of the Judicial Code.)

The order of November 24, 1947, was not a "final decision." (*Catlin* v. *United States*, 324 U. S. 229, 233). Nor was it an "injunction" within the meaning of Section 129 of the Judicial Code.

It was merely a temporary stay tentatively imposed by the District Court as part of its control over the cause pending before it. It related only to the course of the action itself. It was not a stay conditioned upon conduct or events outside the suit itself. It concerned merely security for costs in the suit.

No case has ever held that a mere stay pending the furnishing of security for costs was either "a final decision" or "an injunction" within the meaning of Sections 128 and 129 of the Judicial Code.

(2) Plaintiff's counsel emphasize *Ettelson* v. *Metropolitan Life Insurance Co.*, 317 U. S. 188.

In that case, the defendant insurance company filed a counterclaim or cross-action alleging fraud by the plaintiff in the procurement of the policies of insurance on which the action was brought. The counterclaim prayed for the cancellation of such policies and for a permanent injunction against the prosecution of any action thereon. The District Court granted to the defendant an order that the issue of fraud and of cancellation be tried and decided before any trial of the plaintiff's action to recover on the policies. The Supreme Court held that such an order was in effect a temporary injunction granting interim part of the very relief by way of permanent injunction prayed for in the counterclaim, and that, therefore, it was appealable. The Supreme Court said (p. 192):

> "The plaintiffs are, therefore, in the present instance, in no different position than if a state equity court had restrained them from proceeding in the law action. Nor are they differently circumstanced than was the plaintiff in the *Enelow* case."

The Supreme Court in no way intimated that an ordinary stay in the procedural development of an equity action—as, for example, a stay pending compliance with an order for security of costs—was henceforth to be regarded as an interlocutory order of injunction and appealable as such.

This basic distinction has been recognized and pointed out in many judicial decisions since the *Enelow* and *Ettelson* cases. See, for example, *Dowling Bros. Distilling Co.* v. *United States*, 153 F. (2d) 353, decided by the Circuit Court of Appeals for the Sixth Circuit in 1946. In that case, in recognizing and developing this distinction, the Circuit Court of Appeals said (p. 356):

> "Its characterization as an injunction is rested on *Enelow* v. *New York Life Ins. Co.*, 293 U. S. 379, 55

S. Ct. 310, 79 L. Ed. 440, wherein it was held that a refusal by a court of equity to stay proceedings at law, is a grant or refusal of an injunction appealable under section 227. As pointed out, however, in *United States* v. *Horns,* 3 Cir., 147 F. 2d 57, the Supreme Court made it clear in the *Enelow* case, that if a court of law itself grants a stay of proceedings before it, the stay is not an injunction but merely an exercise of the court's inherent power to control the progress of a cause before it, so as to maintain the orderly processes of justice. It is only when the power possessed by a court of equity is exercised to stay proceedings in another cause that such action amounts to the grant or refusal of an injunction, and this distinction was stressed in *Cover* v. *Schwartz,* 2 Cir., 112 F. 2d 566. Compare *Triangle Conduit & Cable Co.* v. *National Electric Products Corp.,* 6 Cir., 127 F. 2d 524. With this view we are in accord. It follows that the appeal in No. 10,009 must be dismissed."

In *Cover* v. *Schwartz,* 112 F. 2d 566 (C. C. A. 2nd) the plaintiff brought suit for a patent infringement. Some two years later the defendant asked that the trial be stayed until determination of certain proceedings by the Court of Customs. The District Court granted such a stay and the plaintiff appealed. After stating that the order staying the trial was obviously not a "final decision" appealable under Section 128 of the Judicial Code, the Circuit Court of Appeals held that the order appealed from did not amount to an interlocutory injunction within the meaning of Section 129 of the Judicial Code and dismissed the appeal. The Court said (p. 567):

"In the present case the order which aggrieves the plaintiff is merely a temporary stay imposed by the district court as part of its control over the cause pending before it. It affects only the time of trial and amounts to nothing more than a continuance. It

is not analogous to a stay against proceedings in another cause or to a stay granted under section 274b of the Judicial Code. A trial in the present case will be held and the issues tried out if the parties insist, whatever the outcome of the case in the Court of Customs and Patent Appeals."

The above case was followed in *United States* v. *Horns*, 147 F. 2d 57 (C. C. A. 3rd) wherein the Circuit Court said (p. 60):

"We turn next to the more difficult question whether the order under attack, insofar as it was a denial of the requested stay of the criminal proceedings, is an order denying an injunction and therefore appealable under Section 129 of the Judicial Code, 28 U. S. C. A. §227. The difficulty arises from the fact that it has been held by the Supreme Court that the grant or refusal by a court of equity of a stay of proceedings at law is a grant or refusal of an injunction and, therefore, appealable by virtue of Section 129. *Enelow* v. *New York Life Ins. Co.*, 293 U. S. 379, 55 S. Ct. 310, 79 L. Ed. 440. *Shanferoke Coal & Supply Corporation Co.* v. *Westchester Service Corporation*, 1935, 293 U. S. 449, 55 S. Ct. 313, 79 L. Ed. 583.

In the *Enelow* case the Supreme Court, however, made it clear that if a court of law itself grants a stay in proceedings before it or a court of equity grants a stay in proceedings before it the stay is not an injunction. In such a case the stay is granted by virtue of the court's inherent power to control the progress of the cause pending before it so as to maintain the orderly processes of justice. It is only when the power possessed by a court of equity to stay proceedings in another court is exercised that the court's action amounts to the grant or refusal of an injunction. This distinction was stressed in *Cover* v. *Schwartz*, 2 Cir., 1940, 112 F. 2d 566, and is controlling here."

To the same effect are:

United States v. *Mayfair Meat Packing Corp.*, 158 F. 2d 685; certiorari denied, 331 U. S. 805;

Dowling Bros. Distilling Co. v. *United States*, 153 F. 2d 353, 356 (C. C. A. 6th); certiorari denied (*Gould* v. *U. S.*, 328 U. S. 848);

Triangle Conduit & Cable Co. v. *National Electric Products Corporation*, 127 F. 2d 524, 525 (C. C. A. 6th);

Emery v. *Central Trust and Safe Deposit Co.*, 204 Fed. 965 (C. C. A. 6th);

Beckhardt v. *National Power & Light Co.*, 164 F. 2d 199 (C. C. A. 2nd).

In *Aspinook Corp.* v. *Bright, District Judge*, 165 F. 2d 294, certiorari denied 333 U. S. 846, March 8, 1948, District Judge Bright had refused to compel the plaintiff in a derivative action to furnish a bond in the sum of $90,000 under Section 61(b) of the New York General Corporation Law. The Circuit Court of Appeals for the Second Circuit denied a petition by the defendant corporation for mandamus on the ground that "there seems no occasion to call into play this extraordinary remedy" (p. 295). The Supreme Court of the United States, on March 8, 1948, denied a petition for a writ of certiorari, and also denied a motion for leave to file a petition for a writ of mandamus (333 U. S. 840). Since the implication of that decision is that an order denying both the bond and the accompanying stay was not appealable under Section 129, an order granting a bond and accompanying stay would also not be appealable thereunder.

The action of the Circuit Court of Appeals in dismissing the appeal in the present case is not only not in conflict with any decision of any Circuit Court of Appeals rendered under like circumstances, but is in line with unbroken and consistent precedents and judicial interpretation of Section 129 of the Judicial Code.

POINT IV

Although the petitioner's attack on the constitutionality of Sections 61(b) and 64 of the General Corporation Law of the State of New York is irrelevant for the various reasons above stated, nevertheless it is appropriate to inform this Court that on July 16, 1948, the Court of Appeals of the State of New York unanimously upheld their constitutionality.

On July 16, 1948, in *Lapchak* v. *Baker*, Law Rep. News, July 30, 1948, page 2, the New York Court of Appeals unanimously affirmed a decision of the Special Term of the Supreme Court of the State of New York dismissing a complaint in a derivative stockholder's suit because of the plaintiff's failure to furnish a required bond in the sum of $25,000 as security for the defendants' costs, legal fees and other expenses under Section 61(b) of the General Corporation Law of the State of New York.

In affirming the constitutionality of that Section and of the related Sections 64 and 68, the Court of Appeals said:

> "In giving his executive approval to section 61-b, the Governor of the State issued a memorandum (Public Papers of Governor Dewey (1944), p. 255) in which he made the following commentary upon stockholders' derivative actions: 'In recent years a veritable racket of baseless lawsuits accompanied by many unethical practices has grown up in this field. Worse yet, many suits that were well based have been brought, not in the interest of the corporation or of its stockholders, but in order to obtain money for particular individuals who had no interest in the corporation or in its stockholders. Secret settlements—really pay-offs for silence—have been the subjects of common suspicion.' The existence of some of these evils is here conceded. Moreover, the Legislature, as we must assume, in-

quired and found (1) justification for making special provision in respect of derivative suits brought by holders of relatively small amounts of a corporation's stock and (2) occasion for requiring plaintiffs in such suits to give reasonable security for litigation expenses of defendants therein. (See *O'Gorman & Young* v. *Hartford Fire Ins. Co.*, 282 U. S. 251, 257-258; *South Carolina State Highway Dept.* v. *Barnwell Bros., Inc.*, 303 U. S. 177, 190-191; *Szold* v. *Outlet Embroidery Supply Co.*, 274 N. Y. 271, 278; *East New York Sav. Bank* v. *Hahn*, 293 N. Y. 622, 628, affd. 326 U. S. 230.) Of course, it is not for us to question the wisdom of the choice of remedy here adopted by the Legislature.

On this record, then, section 61-b cannot be held to be so palpably arbitrary or unduly discriminatory as to be obnoxious either to the due process clause or to the guaranty of the equal protection of the laws.

The judgment should be affirmed, with costs."

POINT V

Finally, although any questions as to whether the District Court had power, discretionary or otherwise, to apply Sections 61(b) and 64 of the General Corporation law of the State of New York is irrelevant for the various reasons above stated, nevertheless the reasons of fact and of law assigned by the District Court for its determination were clearly justifiable and do not fall within the special considerations controlling the granting of a writ of certiorari.

These reasons are fully stated in the portion of the opinion of the District Court beginning at the bottom of page 6 of the Record.

We particularly emphasize the case of *Angel* v. *Bullington*, 330 U. S. 183, cited therein (R. p. 8), and the decisions of this Court cited in the *Angel* case. As said in the *Angel* case:

> "Diversity jurisdiction must follow state law and policy. A Federal Court in North Carolina, when invoked on grounds of diversity of citizenship, cannot give that which North Carolina has withheld."

Of the North Carolina statute involved in that case, the North Carolina Supreme Court had said (according to the quotation therefrom on page 187 of the decision of this Court):

> " 'The statute operates upon the adjective law of the State, which pertains to the practice and procedure, or legal machinery by which the substantial law is made effective, and not upon the substantive law itself. It is a limitation of the jurisdiction of the courts of this State.' "

This decision is the more applicable because the New York Court of Appeals has held that Section 61(b) of the General Corporation Law of that State "differs from (such) purely procedural statutes both in purpose and effect" and, on behalf of the corporation sued derivatively, "creates a remedy for a wrong for which previously there was no remedy." (*Schielcrawt* v. *Moffett*, 294 N. Y. 180, 190.)

We also emphasize *Sioux County* v. *National Surety Co.*, 276 U. S. 238, which held applicable in the federal court a state statute which required in certain insurance cases that the plaintiff give security for the defendant's costs and expenses, including reasonable attorney's fee.

POINT VI

The motion for leave to file a petition for a writ of certiorari under Section 262 is without merit for the reasons above stated, and also because such a motion will be granted only "in exceptional circumstances", and will not be granted where an adequate remedy may be had in a lower Federal Court or where the petitioner has not exhausted his rights and opportunities reserved to him by the lower court.

Ex parte Abernathy, 320 U. S. 219.

The statutory policy against piecemeal appeals should be controlling.

CONCLUSION

The petition and motion should be denied.

Dated, August 19, 1948.

Respectfully submitted,

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